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IN THE

Supreme Court of the United States

October Term, 1961

No. 251

MAURICE F. O'CONNELL, *et al.*,

Petitioners,

—against—

JAMES E. ALLEN, Commissioner of Education of the State of New York, THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

LOUIS MANSDORF
Attorney for Petitioners
320 Broadway
Borough of Manhattan
New York 7, New York

EMANUEL N. FRANKEL,
Of Counsel.

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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IN THE

Supreme Court of the United States

October Term, 1961

No.

MAURICE F. O'CONNELL, et al.,

Petitioners,

—against—

JAMES E. ALLEN, Commissioner of Education of the State of New York, THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

The petitioner, MAURICE F. O'CONNELL, for himself and on behalf of others similarly situated*, prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York, dated April 27, 1961, and entered on May 5th, 1961 in the office of the Clerk of the Supreme Court, Albany County.

Opinions Below

The Court of Appeals order, (without opinion), denying a motion for leave to appeal (not yet officially reported),

* An itemized list of each petitioner is set forth in Appendix "A".

is appended hereto as Appendix "B"; the order of the Appellate Division, Third Department, denying leave to appeal to the Court of Appeals is reported in 12 App. Div. 2d 861, 210 N. Y. S. 2d 821, and is appended hereto as Appendix "C".

Pursuant to stipulation (Appendix "D"), the O'Connell petitioners agreed with respondents that the decision of the Appellate Division, Third Department, in *Wolfson* v. *The State Education Department* et al., presenting identical issues and then pending in that court, would be the decision in *O'Connell.*

The opinion of the Appellate Division, Third Department in *Wolfson*, affirming the lower court, is reported in 11 App. Div. 2d 891, 203 N. Y. S. 2d 261, and is appended hereto as Appendix "D-1" and the order entered thereon is appended hereto as Appendix "E"; the opinion of the Supreme Court, Albany County (Elsworth, J.) in *Wolfson* is unreported but is contained on pp. 38-39 of the *Wolfson* record, and the order entered thereon is set forth on pp. 3-4 of said record.

The opinion of Bookstein, J., in the Supreme Court, Albany County, in *O'Connell* is unreported but is appended hereto as Appendix "F"; and the order based thereon is Appendix "G".

Grounds on Which Jurisdiction Is Invoked

(i) The final order of the Supreme Court, Albany County was entered on May 5, 1961 (Appendix "A") based upon the order of the Court of Appeals dated April 27, 1961 denying leave to appeal.

(ii) No motion for rehearing was made or extension of time applied for.

(iii) The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

Statutes Involved

Education Law:

§ 7403, subd. 2, L. 1959, c. 718, § 1.

§ 7403, subd. 2, L. 1960, c. 332, (16 McKinney's, Part 3, Con. L.)

1 McKinney's Statutes, §§ 76, 193, 365.

(The aforementioned statutes and statutory construction rules, are set forth in Appendix "H".)

Questions Presented for Review

1. Were the petitioners' property rights and privileges guaranteed by the Fourteenth Amendment violated by the denial of their applications for certificates as "Certified Public Accountants" made pursuant to the provisions of Education Law § 7403, subd. 2, as amended by L. 1959 c. 178, § 1, effective April 23, 1959?

2. Were the petitioners' property rights and privileges guaranteed by the Fourteenth Amendment violated by the refusal of the State Court to direct respondents to issue said certificates as "Certified Public Accountants"?

Statement of the Case *

Petitioners seek an order directing the respondents to issue them certificates as certified public accountants pursuant to the provisions of § 7403, subd. 2 of the Education Law, as amended by Chapter 718, Laws of 1959, effective April 3, 1959 (19-29)** which petitioners contend does not require that they pass an examination.

As provided by the statute, each of the petitioners has been graduated from a college offering a curriculum in accounting which was registered and approved by the State Education Department.

Applications and checks in payment for the applied certificates were duly forwarded to the Education Department pursuant to the aforesaid statute. All applications were rejected by respondents on the ground that the petitioners were required to take and pass examinations before certificates would be issued.

Subsequently, on March 31, 1960, § 7403 subd. 2 was amended to provide specifically for the passing of an examination by all applicants for "C.P.A." certificates, § 7403, subd. 2, L. 1960, c. 332).

---

* All facts, folio and page references refer to the record in the Test Case of *Wolfson* v. *State Education Department*, Case #2412, Appellate Division, Third Department. *These facts are admitted by the pleadings.* The parties hereto stipulated on May 19, 1960, that the decision of the Court in *Wolfson* be made the decision in the within case, *O'Connell et al.* v. *Allen, et al.*, which bears Case #2921, in the Appellate Division, Third Department. (See Appendix "D" for stipulation.)

** All references are to folio numbers in record of *Wolfson* v. *State Education Department, et al.*

The facts of the petition in *O'Connell* are admitted, the respondents having interposed an objection in point of law that the petition fails to state facts sufficient to constitute a cause of action.

Timely Raising of Federal Question

The federal questions referred to hereinabove, sought to be reviewed, were raised, as follows:

In *Wolfson*, the issue was raised in the Supreme Court, Albany County, by the very nature of the Article 78, Civil Practice Act proceeding to compel the State Department of Education to recognize and enforce the petitioners' rights and to compel the issuance of a "C.P.A." certificate as required by statute (R. 8, 9) and denied (R. 39). In the Appellate Division, Third Department, the constitutional issues were raised by Petitioner's Reply Brief, p. 3, the court opinion making no reference thereto.

In *O'Connell*, the petition raised the identical issues as *Wolfson*. In Petitioners' amicus brief in *Wolfson*, the constitutional issues were raised on p. 25 of the *O'Connell* brief. No reference was made thereto by the Appellate Division, Third Department. In the Court of Appeals, the issue was again raised in Appellants' Brief, Point IV, p. 36, but no reference made thereto by that Court.

Reasons for Granting Writ

Where the interpretation of a state statute by The Court of Appeals of the State of New York is arbitrary and unreasonable and results in the deprivation of property rights

under the Fourteenth Amendment of the United State Constitution, this Court should determine for itself the issues involved under the equal protection clause.

POINT I

Petitioners' property rights and privileges under the Fourteenth Amendment were violated by the denial of their applications for certificates as certified public accountants pursuant to statute, and the refusal of the Court to direct respondents to issue same.

A. The Statute and Its Amendment

Petitioners assert their claim to certificates as "Certified Public Accountant" under the Education Law, § 7403. sub. 2, L. 1959, c. 718 § 1 (effective April 23, 1959). This statute specifically provides for the issuance of a C.P.A. certificate to an individual who is a high school graduate

> "*and either* (a) has been graduated from a college, offering a curriculum in accounting which shall have been registered by the Department, *or* (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commission and has the professional experience required by the regulations of the commissioner and passes the examination required by the department . . . (Emphasis supplied.)

The petitioners claim compliance with subdivision (a).

Thereafter on March 31, 1960 the legislature amended § 7403, sub. 2 by L. 1960, c. 332, to specifically require a high school graduate to have "been graduated from a college after completing a curriculum in accounting which

shall have been registered by the department" or "graduated from a college with the equivalent college training in accountancy" *and* "passes the examination".

The petitioners having acted under the 1959 law, filed their petitions and applications with filing fees and records, and created a constitutionally irrevocable contract which neither the subsequent legislature nor the Department of Education can impair.

The interpretation of the 1959 statute has been varied by the court to mean exactly what the 1960 amendment effected, to wit: that an applicant for a C.P.A. certificate must pass an examination despite the fact that he was "graduated from a college offering a curriculum in accounting which shall have been registered by the department".

However, where the 1959 statutory intent was plain and unambiguous, the court could not construe such statute to vary its meaning. *McCluskey* v. *Cromwell*, 11 N. Y. 2d 593, 601-602; *New Amsterdam Casualty Company* v. *Stecker*, 3 N. Y. 2d 1, 6; *Tishman* v. *Sprague*, 293 N. Y. 42, 50. Neither the court nor the legislature can declare, retroactively, that an existing statute, or a statute involved in litigation, shall receive a construction contrary to that which the statute would ordinarily have received. *Roosevelt Raceway, Inc.* v. *Monaghan*, 9 N. Y. 2d 293, 304-305, 213 N. Y. S. 2d 729, 735.

In the instant case, the Supreme Court, Albany County, Special Term, and the Appellate Division, Third Department, varied the meaning of the 1959 statute by disregarding the specific *disjunctive* requirement between subdivisions (a) and (b) "either . . . or", of § 7403 subd. 2

(1959 statute) of the Education Law. Instead it imposed a *conjunctive* interpretation upon this phrase in complete disregard of § 365, Statutes, Book 1, McKinney's Consolidated Laws which declares:

> ". . . When 'or' is used in connection with 'either' it is difficult, if not impossible, to interpret it as 'and'."

The lower courts ignored subdivision (a) completely, and applied subdivision (b) exclusively!

If the 1959 statute meant what the courts said it does, then there was no need for the 1959 statute and much less need for the 1960 amendment.

The crux of the lower court's opinions is that it is inconceivable that the legislature would pass a statute permitting certification as a Certified Public Accountant without the express passing of an examination. Of course, the wisdom of a statute is not the concern of the courts. Besides, history shows numerous legislatures to have so acted on more than one occasion.

In 1860, In re: *Cooper*, 22 N.Y. 67, 87-88, 94, the New York Court of Appeals upheld a statute authorizing the admission to the bar of New York of all Columbia Law School College graduates *without passing a further examination.*

In 1947, the New York legislature, L. 1947, C. 340, provided that a certificate as a "Certified Public Accountant" may be issued to all applicants who had 15 years of experience, *without* requiring said applicants to take and pass *an examination.* This statute was repealed one year later by L. 1948, c. 629.

In *Elliott* v. *University of Illinois*, 365 Ill. 338, 6 N.E. 2d 647, 651, cert. den. 302 U. S. 691, the Illinois Court of Appeals held as constitutional the legislative act authorizing the granting of a certificate as a "Certified Public Accountant" to 21 year old graduates from the University of Illinois *without further examination other than graduation from that university.*

In *Dent* v. *State of West Virginia*, 129 U. S. 114, 121, 122, 9 S. Ct. 231, 233, 32 L. ed. 623, this Court upheld as valid a state regulation for licensing doctors, *without examination*, provided the doctors were graduated from a reputable medical college *or* practiced medicine for ten years.

In *Graves* v. *Minnesota*, 272 U. S. 425, 428, 75 S. Ct. 461, 466, 99 L. ed. 563, this Court upheld the statute licensing dentists to practice their profession provided the licensees held a diploma from a reputable dental college. *No special examination* was required here.

The interpretation of the 1959 statute that compulsory examinations are required, is not justified, because it is an arbitrary and unreasonable restriction which interferes with a lawful business or occupation. Such restrictions are invalid. *Liggett Company* v. *Baldridge*, 278 U. S. 105, 113, 49 S. Ct. 57, 59, 73 L. ed. 204, 208.

The lower court's construction nullified the statutory legislation and substituted therefor, judicial legislation.

B. Federal Jurisdiction

The petitioners herein do not claim that the statute involved is unconstitutional. They do claim that the administration of the 1959 statute by the respondents and the

interpretation thereof by the courts of New York State have deprived them of valuable property rights.

The right to practice accounting as a profession is a constitutional "liberty" and "property" right, *Greene* v. *McElroy*, 360 U. S. 474, 492, 79 S. Ct. 1400, 3 L. ed. 2d 1377, 1378; *Dent v. State of West Virginia*, 129 U. S. 114, 121, 122, 9 S. Ct. 231, 233, 32 L. ed. 623; *Schware v. Board of Bar Examiners*, 353 U. S. 232, 239, 1 L. ed. 2d 796, 77 S. Ct. 752, which the state legislature has the authority to regulate and control. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 611, 79 L. ed. 1086.

Where, however, the legislature has enacted a statute, compliance therewith by the beneficiaries thereof creates a valid and binding contract which cannot be subsequently breached by the courts or succeeding legislatures without impairing contractual obligations protected by the Fourteenth Amendment. *Indiana* ex. rel. *Anderson* v. *Brand*, 303 U. S. 95, 104; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637, 63 S. Ct. 1178, 87 L. ed. 1628; *New Jersey* v. *Yard*, 95 U. S. 104, 114.

The improper conduct of state officers in the administration of a state statute creates the basis for a charge of violation of the Fourteenth Amendment. *Mooney* v. *Holohan*, 294 U. S. 103, 112-113, 55 S. Ct. 340, 342, 79 L. ed. 791. In the instant case, the refusal to issue a C.P.A. certificate to petitioners constitutes conduct in violation of the Fourteenth Amendment.

Although the construction of a state statute lies exclusively within the province of the state courts, such construction is not final where the Fourteenth Amendment

is violated. In such cases, this Court will grant certiorari, *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 245, 246, 52 S. Ct. 133, 135, 76 L. ed. 265; and may reconsider the state interpretation where it is violative of the Fourteenth Amendment. *Herbert* v. *Louisiana*, 272 U. S. 312, 316-317, 47 S. Ct. 103, 71 L. ed. 270; *Voight* v. *Webb*, (D. C. Wash.), 47 F. Supp. 743.

Every state official, high or low, is bound by the Fourteenth Amendment, *United States* v. *Raines*, 362 U. S. 17, 25, 80 S. Ct. 519, 525, and where federally protected rights have been invaded, this Court will grant the necessary relief. *Bell* v. *Hood*, 327 U. S. 678, 684, 66 S. Ct. 773, 90 L. ed. 939; *Smith* v. *Allwright*, 321 U. S. 649, 664.

The issue of petitioners' rights was timely raised by the petition in the State courts by the very nature of the proceeding and more specifically by the application for leave to appeal to the Court of Appeals. This is timely application for this Court to entertain jurisdiction. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 366-367, 53 S. Ct. 145, 77 L. ed. 360.

Unless this Court grants certiorari, the petitioners will be irreparably injured.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Supreme Court of the State of New York should be granted.

Respectfully submitted,

LOUIS MANSDORF
Attorney for Petitioners
320 Broadway
Borough of Manhattan
New York 7, New York

EMANUEL N. FRANKEL,
Of Counsel.

APPENDIX A

List of Petitioners

MAURICE F. O'CONNELL

and

SIDNEY ABRAMS
MORRIS ACKERMAN
MILTON AUERBACH
JOHN J. BARBIERI
SAMUEL R. BECKER
LAWRENCE BERNSTEIN
DAVID BLANK
MILTON BRAND
MORRIS BREVDA
JACK BUDNICK
FRANK P. CALABRO, JR.
IRVING CALLAN
MEYER COOPERBERG
JOSEPH R. CONTE
COSMO T. COSMIDES
GEORGE COVEN
JOSEPH DANCIK
PHILIP S. DAVIDSON
BERNARD DEUTSCH
ALBERT B. DORF
ALEXANDER DRUCKER
DAVID DUBOFF
EDWARD EIGER
JEROME EISEN
ARNOLD EPSTEIN
JOSEPH FAJANS
ARNOLD FELDMAN
JEROME J. FELDMAN
ALBERT S. FELLER
SIDNEY FINGERET
MORRIS FISHMAN
WALTER FORMAN
EMANUEL N. FRANKEL
SOLOMON FRIED
PHILIP GALLUB
SAMUEL GELBER
HAROLD GILBERT
JEROME J. GINSBERG
ALEXANDER GLICK
LEO GOLDMAN
NORTON GOLDMAN
SOL GOLDMAN
SIDNEY M. GOODFRIEND
PHILIP GRAFF
MICHAEL R. GRASSO
STANLEY A. GREEN
MASON S. GREENLAND
MARTIN GREENMAN
A. DAVID GRINKER
ARTHUR GROSSMAN
AMBROSE GUSMANO
MORTIMER D. HAUT
SEYMOUR H. HENDEL
ARTHUR HIXON
JACK HOLLDAY
FRED IHLO
SAMUEL M. IMPORT
ALEXANDER M. INTRATOR
HENRY JACOLOW
CARL JURAVEL
DAVID KAGAN
SAMUEL KAPIT
BERTRAM KEYSERLING
LAWRENCE J. KRAMER
JOSEPH I. LASSMAN
JOSEPH R. LATINO
LEO H. LEMONT
RUDOLPH J. LILLIENFELD
SEYMOUR LINDENBAUM
SOLOMON LIPPER
NORMON LIPPMAN
DAVID LUBOWITZ
LEO MANCHER
ALBERT MANDEL
WILLIAM L. MARX
ANTHONY A. MASTRIACO

Appendix A—List of Petitioners

Milton R. Matte
Richard J. May
William E. Mayer
Morton Meyers
Paul Miller
Samuel Mittleman
Ralph V. Morese
Jerome Moskowitz
Louis J. Moskowitz
Louis Mysel
Samuel I. Newman
William Nichols
Leon H. Paisner
Abraham Papish
Louis Park
Moses Park
Vincent P. Petruccelli
Harry P. Flaster
Samuel S. Platt
Samuel N. Posses
Alexander Preiser
Melvyn J. Raphael
Abraham L. Rappaport
Edward Rappaport
Philip Reader
Frederick A. Resnick
Morris Rosenbaum
Norman Ross
Seymour Rubinstein
Carl Sanfilippo
Nathan Schoenfeld
Abraham Schreibman
Louis Schreibman
Jerome J. Schulman
Charles Schwartz
Julius E. Seide
Ralph J. Selby
Samuel Shapiro
Sherman Sheinthal
Robert E. Siegel
Leo Small
Bernard Solomon
Herbert L. Sonking
Seymour Sperber
Bertram L. Steinberg
Harry Stern
Sidney Stitch
George Stone
Benjamin Strauss
Seymour Temkin
Carl S. Tobin
Marvin Todeld
Sing G. Tom
Mario F. Triolo
Samuel L. Waldbaum
Ralph Walters
Emanuel Wasserman
Aaron M. Weinstein
Stanley Weiss
Ely Wishnick
Irwin Wissner
Alice S. Witte
Kenneth B. Wordsworth
Stewart L. Yanover
Charles Zaslow
Harvey L. Zuckerman

Additional Names to Schedule A

Jack B. Erich
Milton Fialco
Murray Geller
Alfred Gittleson
Stanley Goldstein
Percy Greenberg
David Loring
Bernard J. Martin
Sam Merle
Arthur Murray
Bernard Norvid
Bernard Robbins
Arthur Schwartz
Bernard Silver
Sol Tapper
Geral Weingartner
John West

APPENDIX B

Order of Court of Appeals Denying Motion for Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-seventh day of April, A. D. 1961.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 259

In the Matter of the Application of
MAURICE F. O'CONNELL and others similarly situated, &c.,

Appellants,

—vs.—

JAMES E. ALLEN, Commissioner of Education of the State of New York, The State Education Department, Division of Professional Education, University of the State of New York,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part

of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

[Seal]

GEARON KIMBALL
Deputy Clerk

SIR:

Please take notice that the foregoing is a true copy of an Order made in the above entitled matter and duly entered and filed in the office of the Clerk of the County of Albany, on the 5th day of May, 1961.

Dated, Albany, N. Y., May 9, 1961

CHARLES A. BRIND
Attorney for Respondents
(address)

To:

LOUIS MANSDORF, Esq.
Attorney for Appellants
(address)

APPENDIX C

Order of Appellate Division Denying Motion for Leave to Appeal to the Court of Appeals

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department held in the Courthouse in the City and County of Albany commencing on the 19th day of January, 1961.

Present:

HON. FRANCIS BERGAN
Justice Presiding

HON. WILLIAM H. COON
HON. JAMES GIBSON
HON. J. CLARENCE HERLIHY
HON. WALTER B. REYNOLDS
Associate Justices

2412

In the Matter of
The Application of MAURICE F. O'CONNOR, et anos,
Petitioners-Appellants

for an Order under Article 78 of the Civil Practice Act,

—v.—

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York, The State Education Department, Division of Professional Education, University of the State of New York,
Respondents-Respondents.

Appendix C—Order of Appellate Division Denying Motion for Leave to Appeal to the Court of Appeals

The above-named petitioners-appellants in this proceeding having moved for leave to appeal to the Court of Appeals from the unanimous order of this Court entered in the office of the Clerk of this Court on the 3rd day of November, 1960, affirming the order of the Special Term of the Supreme Court in the above-entitled proceeding, entered in the office of the Clerk of the County of Albany on the 3rd day of November, 1960, which order dismissed the petition herein seeking a review of a determination of the State Education Department Commissioner of Education dismissing the appeal, in refusing certification, as Certified Public Accountant, of petitioners-appellants for failure to comply with the requirements of the Education Law with respect to passage of an examination.

Now, upon reading and filing the notice of motion dated the 2nd day of December, 1960, and the affidavit of Sidney H. Asch, Esq., sworn to on the 2nd day of December, 1960 in support of said motion and the affidavit of Charles A. Brind, Esq., attorney for respondent Commissioner of Education, sworn to on the 13th day of December, 1960, in opposition thereto, and due deliberation having been had, it is

ORDERED, unanimously that the said motion for reargument, or in the alternative, for permission to appeal to the Court of Appeals be, and the same hereby is, denied, without costs.

JOHN J. O'BRIEN
Clerk

Entered March 1, 1961
A true copy
JOHN J. O'BRIEN
Clerk

APPENDIX D

Stipulation as to Decision of Appellate Division, Third Department

SUPREME COURT
OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

In the Matter of the Application of

MAURICE F. O'CONNELL, et al.,

Petitioners-Appellants,

for an Order under Article 78 of the Civil Practice Act

—against—

JAMES E. ALLEN, Commissioner of Education of the State of New York, THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNIVERSITY OF THE STATE OF NEW YORK,

Respondents-Respondents.

The above named petitioners-appellants having served and filed their notice of appeal from the order of Mr. Justice Isadore Bookstein, dismissing their petition, made and filed in the office of the Clerk of Albany County on the 22nd day of January 1960 and the attorneys for the respective parties having agreed that the issues on this appeal are similar to the issues in the case of Hyman Wolfson against

the State Education Department, which appeal will be argued before this Court on May 19, 1960.

Now, THEREFORE, subject to the approval of this Court, it is hereby stipulated by and between the attorneys for the respective parties that the decision of this Court in the Wolfson case be the decision in the above case, and the order of affirmance or of reversal will be made and entered in this case as in the Wolfson case.

Dated: New York, N. Y., May 19, 1960.

SIDNEY H. ASCH
Attorney for Petitioners-Appellants

CHARLES A. BRIND
Attorney for Respondents-Respondents

SO ORDERED:

.....
Justice of the Appellate Division
of the Supreme Court, Third
Judicial Department.

APPENDIX D-1

Decision of Appellate Division, Third Department in Wolfson v. State Education Department

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

Decision handed down Jul 27 1960

2412

In the Matter of the Application of HYMAN WOLFSON,

Petitioner-Appellant,

for an Order under Article 78 of the Civil Practice Act

—v.—

THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNIVERSITY OF THE STATE OF NEW YORK,

Respondent-Respondent.

Appeal from a decision of a Special Term, Albany County Supreme Court (Elsworth, *J.*).

For over sixty years with the exception of a short and carefully prescribed period, the successful passing of an examination has been necessary in New York to become a certified public accountant. Petitioner, who has not passed the examination and has not presented to the State Education Department evidence of acceptable accounting experience argues that a construction of the words of Educa-

tion Law, § 7403, subd. 2, as amended by Laws of 1959, ch. 718, would have permitted his certification while that statute was effective without examination and without evidence of accounting experience. The Court at Special Term has dismissed the petition. It is necessary to examine the language to understand the argument. The pertinent language is as follows: " § 7403(2). An individual shall not be eligible to apply for a certificate as certified public accountant unless he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner, and either (a) has been graduated from a college, offering a curriculum in accounting which shall have been registered by the department, or (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner, and has the professional experience required by the regulations of the commissioner, and passes the examination required by the department. . . ."

Petitioner's argument requires that the two alternatives attached separately to (a) and (b) following the word "either" be read so that all the language following (b) fully to the end of the sentence is an alternative to the language attached to (a).

To read the language this way a person who merely graduates from a college which offers a curriculum in accounting "registered" by the department would be entitled to become a certified public accountant with neither the usual accounting experience nor any qualifying examination, while a college graduate who has "equivalent college train-

ing in accountancy as determined by the commissioner" must pass an examination and also have qualifying experience. Such a distinction does not make senses as a matter of legislative policy looking at the language itself; and when the entirely different purpose which led to the enactment of the 1959 amendment is seen, together with the long history of regulation of public accountancy, it is perfectly apparent that the Legislature had no such distinction in mind as that for which the petitioner argues.

It seems obvious that punctuation was left out of the text after the word "commissioner" in the part attached to (b). But punctuation is not the only means of separating thought in the English language. The conjunction "and" is often used for this purpose and meaning depends on the sense of the other words. Here the (a) and (b) following "either" were both concerned with formal college pretraining for accountance or its equivalent.

But after the word "commissioner" the conjunction "and" introduced a different idea, i.e., the professional experience beyond formal education; the second "and" introduced a still different idea—the examination. Internal construction of the language of the sentence, without any resort to past general legislative history or policy, indicates that the meaning petitioner places on the words does not reflect legislative intention.

Order unanimously affirmed without costs.

Present—Bergan, P.J., Coon, Gibson, Herlihy and Reynolds, JJ.

APPENDIX E

Order of Affirmance of Appellate Division, Third Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Department, held in the Courthouse in the City and County of Albany, commencing on the 31 day of October 1960.

Present:

HON. FRANCIS BERGAN

Justice Presiding

HON. WILLIAM H. COON
HON. JAMES GIBSON
HON. J. CLARENCE HERLIHY
HON. WALTER B. REYNOLDS

Associate Justices

In the Matter of the Application of

MAURICE F. O'CONNELL, et. al.,

—against—

THE STATE EDUCATION DEPARTMENT
DIVISION OF PROFESSIONAL EDUCATION
UNIVERSITY OF THE STATE OF NEW YORK,

Respondents-Respondents.

Appendix E—Order of Affirmance of Appellate Division, Third Department

The Petitioners-Appellants, having appealed to this Court from an order of the Supreme Court of the State of New York, Albany County, at Special Term, entered in the Office of the Clerk of the County of Albany, on the 7th day of April 1960, which order dismissed the proceedings instituted by the petitioners herein on the merits without costs and the attorneys for the respective parties having agreed and stipulated that the issues on this appeal are similar to the issues in the case of Hyman Wolfson against the State Education Department which appeal was to be argued before this Court on May 19, 1960 and having furthere stipulated subject to the approval of this Court that the decision of this Court in the Wolfson case be the decision in the above-entitled matter and that an order of affirmance or of reversal would be made and entered in the above-entitld case as in the Wolfson case and the appeal in the case of Hyman Wolfson against the State Education Department having been argued before this Court at the Term above stated by Hyman Wolfson, Esq., attorney for Petitioner-Appellant in that case and Charles A. Brind, Esq., attorney for Respondents-Respondents in that case and this Court at the same time having heard arguments by Sidney H. Asch, Esq., attorney for Petitioners-Appellants Maurice F. O'Connell, et al. and a brief having been filed *Amicus Curiae* by said Sidney H. Asch, Esq., attorney for Maurice F. O'Connell, et al, and due deliberation having been had and this Court having rendered its decision,

Now, upon motion of Charles A. Brind, Esq., attorney for Respondents-Respondents, it is

Appendix E—Order of Affirmance of Appellate Division, Third Department

ORDERED, pursuant to the beforementioned stipulation, that the order so appealed from be, and the same is hereby unanimously affirmed, without costs.

JOHN J. O'BRIEN
Clerk

A true copy,
JOHN J. O'BRIEN
Clerk

Entered November 3, 1960

APPENDIX F

Memorandum of Bookstein, J. in O'Connell v. Allen, et al.

SUPREME COURT

ALBANY COUNTY

[SAME TITLE]

(Supreme Court, Special Term, Albany County, January 22, 1960. Finally submitted February 16, 1960. Decided March 8, 1960.)

BOOKSTEIN, *J.*

The precise question raised in this proceeding was raised in the case of Wolfson vs. The State Education Department, et al., in which Mr. Justice Elsworth determined the matter adversely to the contention of petitioners herein. Not only do I feel bound by that decision but I find myself in accord therewith.

Motion to dismiss petition granted.

Submit order.

APPENDIX G

Order of Bookstein, J. Granting Motion to Dismiss Petition

At a Special Term, Part I of the Supreme Court held in and for the County of Albany at the Courthouse in the City of Albany, the 22nd day of January, 1960.

Present:

HON. ISADORE BOOKSTEIN,

Presiding.

In the Matter of the Application of

MAURICE F. O'CONNELL, et. al.,

Petitioners,

For an Order under Article 78 of the Civil Practice Act

—against—

JAMES E. ALLEN, Commissioner of Education of the State of New York, the State Education Department, Division of Professional Education, University of the State of New York,

Respondents.

The Petitioners, having moved this Court for an order under Article 78, Civil Practice Act, to review the determination of the respondents and directing the issuance of a certificate as a Certified Public Accountant to petitioners and said motion having regularly come on to be heard before me on January 22, 1960,

Appendix G—Order of Bookstein, J. Granting Motion to Dismiss Petition

Now, upon reading and filing the notice of motion, the petition of Maurice F. O'Connell, et al., duly sworn to on November 20, 1959, together with Schedule A attached thereto; the stipulations between the attorneys for Petitioners and Respondents stipulating that additional persons be made parties to these proceedings; the Respondents' Objection in Point of Law, dated January 15, 1960; the Order to Show Cause, signed January 18, 1960 by Honorable Isadore Bookstein, Justice of the Supreme Court; affidavit of Thomas G. Higgins, sworn to January 15, 1960; the Order, signed January 22, 1960 by Honorable Isadore Bookstein, permitting the New York State Society of Certified Public Accountants to appear and file a brief *amicus curiae* in these proceedings; and after hearing Sidney H. Asch, Esq., attorney for Petitioners, Charles A. Brind, Esq., attorney for Respondents, Elizabeth M. Eastman, Esq., of Counsel, and Cahill, Gordon, Reindel & Ohl, Esqs., attorneys for The New York State Society of Certified Public Accountants, Mathias F. Correa, Esq. of Counsel, and due deliberation having been had thereon,

Now, on motion by Charles A. Brind, Esq., attorney for Respondents, it is

ORDERED, that the petition herein be, and the same hereby is, dismissed in all respects.

ISADORE BOOKSTEIN
J. S. C.

Liber 369 Page 312

Enter

Dated, April 6th, 1960.

APPENDIX H

Statutes Involved

EDUCATION LAW (16 McKinney's Con. L. Part 3)

§ 7403, subd. 2, L. 1959, c. 718, § 1 (eff. April 23, 1959)

• • • • •

"2. An individual shall not be eligible to apply for a certificate as certified public accountant unless he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner, *and either* (a) *has been graduated from a college, offering a curriculum in accounting which shall have been registered by the department, or* (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner and has the professional experience required by the regulations of the commissioner and passes the examination required by the department or has passed, before the enactment of this article, all parts of the examination required by the department but has not received a certificate as a certified public accountant because of the lack of the professional experience required by the regulations of the commissioner. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners or corresponding agency in another state. (Emphasis supplied.)

EDUCATION LAW (16 McKinney's Con. L. Part 3)

§ 7403, subd. 2, L. 1960, c. 332 (eff. March 31, 1960)

Appendix II—Statutes Involved

AN ACT to amend the education law, in relation to the public practice of accounting

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two of section seven thousand four hundred three of the education law, as last amended by chapter seven hundred eighteen of the laws of nineteen hundred fifty-nine, is hereby amended to read as follows:

Section 2. An individual shall not be eligible to apply for a certificate as certified public accountant unless

(a) he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner; and

(b) either

(i) has been graduated from a college after completing a curriculum in accounting which shall have been registered by the department, or

(ii) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner; and

(c) either

(i) has the professional experience required by the regulations of the commissioner and passes the examination required by the department, or

(ii) has passed, before the enactment of this article, all parts of the examination required by the department but has not received a certificate as a certified public account

ant because of the lack of the professional experience required by the regulations of the commissioner.

The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners or corresponding agency in another state.

1 McKinney's Statutes

§ 76. *Statutes Too Clear for Construction*

Some statutes are framed in language so plain that an attempt to construe them is superfluous. The function of the courts is to enforce statutes, not to usurp the power of legislation, and if the legislative intent is clear no attempt at construction will be made. The courts will carry out the obvious intention of the lawmaking body, subject only to its power to strike down an enactment which conflicts with the state or federal constitution. When the language is explicit, the courts are bound to seek for the intention in the words of the act itself to the extent that they are not at liberty to suppose or to hold that the Legislature had an intention other than their language imports. But the fact that the words used are not ambiguous does not prohibit the courts from considering the surrounding circumstances, the canons of construction, acts in pari materia, and other considerations indicating the legislative intent, it is clear intent, not clear language, which precludes further investigation as to the interpretation of a statute. Language of a portion of an act, which, when separated from the rest,

is plain and unambiguous, may, when read in connection with the whole act, be thereby rendered ambiguous, and thereupon the necessity for construction arises. And, if a statute viewed from the standpoint of the literal sense of the language, works an unjust or unreasonable result, an obscurity of meaning exists which calls for judicial construction.

1 McKinney's Statutes

§ 193. *Significance of Change of Language*

It is a well settled rule that in a general code revision a mere change in phraseology does not import a change in construction. But the same rule does not apply where the Legislature deliberately changes a single section, or a few sections, of a law. In such cases it is thought that the Legislature, by changing intended to materially change the law, and courts must seek the new legislative purpose and construe the law so that it may be effectuated, for otherwise the amendment would be nugatory. It might occasionally happen, of course, that the Legislature in attempting to amend a statute would, by the use of inapt terms, really effectuate no change; but a construction which imputes such an inoffensive folly to the lawmaking body is to be avoided. Thus a material change in the phraseology of an act is generally regarded as a legislative construction that the law so amended did not originally embrace the amended provisions, and when provisions contained in an original act are omitted from an amendatory act, it is reasonable to presume that they were intentionally omitted. The force to be given subsequent legislation as affecting prior legislation also depends somewhat upon the time of the enactment and

the surrounding circumstances, including the history of the various enactments. If it follows soon after controversies have arisen as to the interpretation of the original act, it may well be construed as explanatory of the ambiguities over which such controversies arose. But if the change takes place after a considerable lapse of time and after the intervention of other sessions of the Legislature, it indicates an intention to supply some provisions not embraced in the former statute. The intervention of judicial decisions may also be a material element in determining the effect of an amendment. If a term or clause used in the original statute has been judicially construed, the retention of such term or clause in a subsequent amendatory act generally requires that it shall receive the same construction; but an amendment substituting a different term forceably indicates that the judicial decision did not correspond with legislative intent, and that a different interpretation should be had. Thus, if a statute is held by the courts to be discretionary and an amendment using the word "shall" is made almost immediately after the decision, an intention to make the statute preemptory is thereby indicated. So too, where the court in the construction of a statute has given considerable significance to certain phrases, the reenactment of the statute with the omission of such phrases, tends to show that the Legislature intended a different rule.

1 McKINNEY'S STATUTES

§ 365. *"Or" Construed as "And" and Vice Versa*

One mistake which is occasionally made by the drafters of statutes is the use of the word "and" when "or" is intended or vice versa. The popular use of "or" and "and"

is notoriously loose and inaccurate, and this use is reflected in the wording of statutes. When it is apparent that the Legislature has erroneously used the wrong word, the courts will make the necessary change in the statute in order that it shall conform to the legislative intent. In fact, the courts are always justified in departing from the literal meaning of words when necessary to preserve the intent of the Legislature. Normally, the Legislature accurately expresses itself, and the words are construed according to their grammatical meaning; but when the context of the statute and the surrounding circumstances indicate that the lawmakers have made an error in the choice of words, the court will not hesitate to construe the statute so as to effectuate the intent of the lawmakers. This change in conjunctions is made only to carry out the legislative intent; the courts will never indulge in such liberty with the words of a statute where the effect of the change will be to thwart the legislative purpose. *When "or" is used in connection with "either", it is difficult, if not impossible, to interpret it as "and".* (Emphasis supplied.)

Office Supreme Court, U.S.
FILED
APR 24 1961
JAMES F. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 251

MAURICE F. O'CONNELL, *et al.*,

Petitioners,

against -

JAMES E. ALLEN, Commissioner of Education of the State of New York, The State Education Department, Division of Professional Education, University of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A. BRIND,
Attorney for Respondents,
State Education Building,
Albany 1, New York.

BATAVIA TIMES LAW PRINTERS
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 251

MAURICE F. O'CONNELL, *et al.*,

Petitioners,

against

JAMES E. ALLEN, Commissioner of Education of the State of New York, The State Education Department, Division of Professional Education, University of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents oppose the granting of a Writ of Certiorari to the Supreme Court of the State of New York, Albany County in the above entitled matter on the grounds that:

1. No substantial federal question is presented in this case; and
2. No attempt was made to raise a federal question in a timely manner.

Opinions Below

The decisions of the State Courts in this matter are set forth in Appendices "B" through "G" of the petition for

writ of certiorari and will not be repeated in this brief. It will be noted that the question presented to the State Courts was purely a question of construction of the State statute. The constitutional issues, now purported to be raised in this form, were not argued or decided.

Jurisdiction

Petitioner argues that the very nature of a proceeding under article 78 of the New York Civil Practice Act raises a federal question. It is submitted that there is no merit in such an argument.

A purported federal question must be "specially set up or claimed" and cannot be raised by inference. Oxley Stave Company v. Butler County, 166 U. S. 648, 653; Zadig v. Baldwin, 166 U. S. 485.

Petitioner further claims that a constitutional argument was presented at page 25 of his brief *amicus curiae* in the Wolfson case, and in Point IV of the brief in support of the motion for leave to appeal to the Court of Appeals (page 36).* Both of these arguments were to the effect that rights, which existed under a particular statute, could not be divested or negated by subsequent legislation. The New York Courts did not hold that petitioner's rights were divested by subsequent legislation. The decision of the

* At page 25 of the *amicus curiae* brief in the "Wolfson case", petitioners stated "rights which have arisen under the 1959 Law and which have not been waived cannot now be divested. The enactment of a changed Section 7403 does not defeat the claim of the appellant under the Law of 1959, and those similarly situated".

At Point IV in their brief to the Court of Appeals at page 36, petitioners state, "Under the provisions of the Fifth Amendment of the Constitution of the U. S., the rights asserted by them were statutory property rights, timely availed of and cannot be divested or negated by subsequent legislation".

State Courts involved simply the matter of construction of the statute as it then existed.

It is not sufficient to show that some constitutional question was raised. It must appear that the precise question on which it is urged this Court should take jurisdiction was passed on by the state court. Chapin v. Fay, 179 U. S. 127; Erie R. R. Co. v. Purdy, 185 U. S. 148.

Statutes and Regulations Involved

The section of the New York State Education Law, which specifies the qualifications necessary for the granting of a Certified Public Accountant, reads as follows:

> "§ 7403(2). An individual shall not be eligible to apply for a certificate as certified public accountant unless he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner, and either (a) has been graduated from a college, offering a curriculum in accounting which shall have been registered by the department, or (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner and has the professional experience required by the regulations of the commissioner and passes the examination required by the department or has passed, before the enactment of this article, all parts of the examination required by the department but has not received a certificate as a certified public accountant because of the lack of the professional experience required by the regulations of the commissioner. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners of corresponding agency in another state."

The regulations of the Commissioner of Education so far as pertinent to this matter provide as follows:

§ 91. Professional requirements

1. The examination in certified public accountancy shall consist of

Group 1. The subjects of theory of accounts and of commercial law

Group 2. The subjects of practical accounting and of auditing

Candidates for the certified public accountant certificate who have been graduated from a college offering a curriculum in accounting which shall have been registered by the Department or otherwise have complied with the education requirements of the Education Law shall be entitled to admission to the subjects of group 1 of the examination.

2. Candidates shall be entitled to admission to the group 2 subjects of the examination

a. Who have passed the subjects of group 1 or

b. While sitting for the subjects of group 1 and

c. Who have completed three years' experience in the intensive diversified application of accounting principles and in the intensive diversified application of auditing procedures in the public practice of accountancy satisfactory to the State Board of Certified Public Accountant Examiners, subject to review by the Commissioner of Education. The said experience shall be completed not less than 90 days prior to the date of the examination. The State Board of Certified Public Accountant Examiner shall accept service in the Armed Forces of the United States subsequent to July 1, 1940, on the basis of one month's credit for each six months' service, with a maximum credit of eight months.

3. • • •

Section 7404 of the Education Law as in effect prior to the enactment of Chapter 718 of the Laws of 1959, provided as follows:

Former Section 7404,* the predecessor of the present Section 7403 provided as follows:

"§ 7404. Examinations; indorsement of certificates.

1. The certificate of certified public accountant of the state shall be issued, upon application to the department and the payment of a fee to be fixed by the department, which fee is to accompany the application, to any citizen of the United States, or to any person who has declared his intention of becoming such citizen, who resides within the state or has a place for the regular transaction of business therein, who is twenty-one years of age or over and of good moral character, who submits evidence satisfactory to the department of the possession of academic and professional qualifications for the public practice of accountance and who passes the examination required by the department; provided, that the certificate of certified public accountant of the state issued to any person who has declared his intention of becoming a citizen of the United States shall become void at the expiration of eight years from the date of the declaration of the intention of such applicant to become a citizen, unless prior to the expiration of said eight years evidence is furnished to the department that the applicant has become a citizen of the United States. Provided, further, that every candidate for examination for a certificate of certified public accountant of the state shall present evidence that he has graduated from a college offering a curriculum in accounting which shall have been registered by the department, or that he has graduated from college and has had equivalent college training in accountancy as determined by the commissioner of education, and that prior to the beginning of his course of study in such college he satisfactorily completed a four year high school course approved for this purpose or the equivalent as determined by

* Repealed by Ch. 718, L. 1959.

> the commissioner of education. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners or corresponding agency in another state."

Petitioners refer in the petition for a writ of certiorari to the amendment to Section 7403, subdivision 2 of the Education Law by Chapter 332 of the Laws of 1960. This amendment took place after the applications of petitioners had been filed and acted upon and is not pertinent to this matter. It was never contended by the respondents, nor held by any of the Courts below, that this amendment had any bearing upon the petitioners' rights under the statutes as it existed prior to such amendment.

Statement of the Case

Petitioners seek the issuance to them without taking a written examination of a certificate of certified public accountant. The applications have been denied. The sole issue is the contention by petitioners that under the construction of the statute for which they argue, graduates of registered schools are not required to have any experience or take any examinations.

The proceeding was commenced in Supreme Court, Albany County. The decision of the Supreme Court is Appendix "F", page 27 of the petition for certiorari. An appeal was taken to the Appellate Division. The petitioner stipulated at this stage that the decision of the Appellate Division in Matter of Wolfson, a similar proceeding, would be deemed to be the decision in this proceeding and petitioner submitted a brief and participated in the oral argument of the Wolfson case. The decision of the Appellate

Division unanimously affirmed the decision of the Supreme Court, rejecting petitioners' contentions (Appendix D-1, page 21 of the petition for writ of certiorari). Thereupon, petitioner moved for leave to appeal to the Court of Appeals which motion was denied by the Appellate Division (Appendix "C" page 17 of petition). A similar motion was denied by the Court of Appeals. (Appendix "B" page 15 of petition). The opinion of the Supreme Court, Albany County, in Matter of Wolfson (unreported) is appended hereto as Appendix A.

ARGUMENT

The question decided by the State Courts was solely the construction of a state statute. The decision did not deprive petitioners of any right secured by the Fifth or Fourteenth Amendment to the Federal Constitution.

The sole issue in the case is petitioners' contention that the amendment of Section 7403 by Chapter 718 of the Laws of 1959 eliminated the requirement of experience and examination in the case of a candidate who graduated from a college offering a registered curriculum in accounting. Consequently, the sole issue is the construction of the state statute and, in this construction, there is no constitutional question.

In order to indicate the lack of such constitutional question, we summarize the argument presented to the Appellate Division of the Supreme Court of the State of New York in this matter.

Assuming for the purposes of argument that there is some ambiguity in the language of Section 7403 of the Education Law as amended by chapter 718 of the Laws

of 1959 it then becomes necessary to look to the intent of the legislature in enacting the statute. In this connection there were presented a number of exhibits in Matter of Wolfson. Respondent's Exhibit A (56-60*) is a copy of the memorandum of Governor Rockefeller in connection with the approval of the law. Exhibit B (61-71) is a letter dated February 17, 1959 to Counsel for the State Education Department by the President of the New York State Society of Certified Public Accountants explaining the changes which had been made prior to the introduction of the bill in 1959 to meet certain objections which had been made to the bill as introduced at the 1958 session. Exhibit C (72-81†) is a copy of the memorandum of the Education Department to the Governor in connection with the bill and Exhibit D (82-111) is a copy of the legislative brief of the New York State Society of Certified Public Accountants which society sought the introduction and enactment of the legislation.

All of these documents indicate that the single purpose of the enactment of this statute was to bring under regulation the entire field of the practice of public accounting. Theretofore any person could practice as a public accountant without restriction. The only thing which had been restricted was the use of the title certified public accountant which was limited to those who had received the certificate upon meeting the statutory requirements of education, experience and examination. The motivating force for the new legislation was the belief that it is in the public interest that all persons practicing public accounting in the State

* Figures in parentheses refer to folios of record on appeal in *Matter of Wolfson*.

† Figures in parentheses refer to folios of record on appeal in *Matter of Wolfson*.

be subject to regulation of professional conduct, in view of the importance to the people of the state of the profession of public accounting as it had developed over the years.

It would be entirely contrary to the intent of the statute to lower the standard for the granting of a certificate of certified public accountant which from the time of its first inception in 1896 has been a certificate showing that the individual has met a high standard of professional competence in respect to education and experience as well as by passing a comprehensive examination. To construe the statute so that the examination and experience is not required in the case of candidates who have graduated from a school having a registered curriculum is to contend for an unreasonable and strained construction, bordering on the absurd.

The alternatives presented in clauses "a" and "b" of Subdivision 2 of Section 7403 have to do with whether or not the candidate attended a registered school or a school which provides an equivalent program. The result of attending either type of institution is substantially equivalent. The next step is for the candidate to have acceptable experience and the last step is the passing of the examination. Under the regulations, of course, the candidate may take the subjects of Part I of the examination after he has completed his education and pending the completion of his experience. The differences between a registered curriculum and one which would be approved as an equivalent would not be of sufficient importance to justify a reasonable conclusion that experience and examination are not required in the case of the graduate of a registered curriculum.

What was done in Section 7403, subdivision 2, was simply to restate the provisions of the law in effect prior thereto.

Because of the addition of new provisions relating to enrollment of public accountants in the bill, the existing provisions of the statute were rearranged and this is the reason for the change in the number of the section. To adopt the petitioner's contention with respect to this statute would be to conclude that the New York State Society of Certified Public Accountants, which represents that profession, and the primary purpose of which is to safeguard the standards of that profession, was urging adoption of a bill which would entitle any graduate of a registered curriculum to become a certified public accountant without any further qualification on his part, whereas over the years present practitioners have been required to meet the standards not only of education but of experience and examination in order to obtain the certificate which is so highly valued as an evidence of the attainment of expertness in this field. This is certainly contrary to any reasonable construction.

Present section 7403 is simply a restatement of the long standing requirements for the certificate of certified public accountants and nothing more.

Judge Elsworth, dismissing appellant's petition in Supreme Court, Special Term, said:

> "In enacting section 7403(2) of the Education Law, the legislature had no intent to set aside a basic requirement so long existing. Chapter 718 of the Laws of 1959 was intended to bring under regulation the entire field of public accounting. In redrafting the sections relating to Certified Public Accountants, there in not the slightest indication that the legislature and executive branches contemplated a softening of the requirements for applicants seeking certification under that classification."

It is interesting to point out that, in 1896 when public accountants were first certified, the *sole* method for a new

accountant to obtain certification was by examination. Up until 1927, when the Certified Public Accountant statute was part of the General Business Law of New York State (Article 8, §§ 80-82), the successful passing of an examination was still required of *all* candidates. By chapter 85 of the laws of 1927, the Certified Public Accountant statute was transferred to the Education Law, and examination still remained the only method of certification. Chapter 261 of the Laws of 1929 provided for an alternate method of licensure, *viz.*, endorsement of a license obtained in another state. The only other exception to the examination requirement was the enactment of chapter 340 of the laws of 1947, providing for the issuance of a certificate without examination to persons who had had *fifteen years of experience* in the intensive application of accounting principles and auditing procedures. This statute remained in effect only one year, being repealed by chapter 629 of the laws of 1948. The Court will note that in this isolated instance when examination was waived the substitute was experience not for three years as the regulations require for admission to the examination, but for fifteen years and that experience had to be of intensive quality. The statute presently before the Court, continues the statutory policy which has been with us since 1896, except for one year of the grandfather clause based on fifteen years of intensive practical experience.

An intention to change a long standing rule will not be imputed to the Legislature in the absence of a clear indication of such intention. (McKinney's Statutes, Section 153; *Buduson* v. *Curtis*, 285 App. Div. 517, aff'd 309 N. Y. 879; *Leach* v. *Anwell*, 154 App. Div. 170; *People ex rel. Desiderio* v. *Connolly*, 212 App. Div. 102.)

Clearly no such drastic change in the law governing the granting of the certificate of Certified Public Account is to be implied in the present case.

Furthermore, under the rules of statutory construction an interpretation of a statute which leads to an unreasonable result is presumed to be against legislative intent and must be avoided. (McKinney's Statutes, Section 143; *Seltzer* v. *City of Yonkers*, 286 App. Div. 557, aff'd 1 N. Y. 2d 782; *East* v. *Brooklyn Heights R. R. Co.*, 195 N. Y. 414; *People* v. *Ryan*, 274 N. Y. 149, 152.)

It is a fundamental rule of statutory construction that even literal language must give way to give effect to the legislative intent. "Strict grammatical rules should not prevail over the manifest sense of the language". (*People* v. *Gates*, 56 N. Y. 387, 2 Cow. Cr. R 67.)

The Courts of this state, reasserting a common rule of construction, have stated that the "proper interpretation requires adherence to the plain, common sense meaning of the language contained in the statute, rather than an application of refined and technical rules of grammatical construction". (*Universal Oil Products Co.* v. *Shell Development Co.*, 196 Misc. 497, aff'd 276 App. Div. 1058, aff'd 301 N. Y. 649; *Butterfield* v. *Rudde*, 58 N. Y. 489; *Kaufman* v. *Schoeffel*, 77 Hun. 140.)

In his memorandum, dismissing the petition of the appellant herein, Judge Elsworth said, "A rigid grammatical construction of the section may justify petitioner's conclusion. However, the law has long since discarded precise formalism and no Court should dignify the absence of a comma as a talisman without probing behind the literal meaning".

It is well recognized that a long continued course of action by state and federal administrative officers is entitled to great weight unless manifestly wrong. (McKinney's Statutes, Section 129.)

In *Mounting and Finishing Co.* v. *McGoldrick*, 294 N. Y. 104, 60 N. E. 2d 825, Judge Desmond said:

> "Of course, statutory construction is the function of the courts, 'but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited', National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 131, 64 S. Ct. 851, 860, 88 L. Ed. 1170. The administrative determination is to be accepted by the courts 'if it has "warrant in the record" and a reasonable basis in law' (same citation). 'The judicial function is exhausted where there is found to be a rational basis for the conclusions approved by the administrative body'."

The petitioner is contending that the Legislature intended to require those applicants who had graduated from a college and have had equivalent college training in accounting (equal to the colleges whose curriculum has been registered by the Department) as determined by the Commissioner of Education to possess professional experience and successfully complete an examination but those applicants who have graduated from a college whose curriculm in accounting has been registered by the Department need not possess such experience and take an examination. To construe this statute in this manner would indeed violate the Constitution. *In both cases the college preparation is equal. A college whose curriculum has been registered is offering no better preparation in accountancy than those other colleges whose graduates would be accepted under alternative (b).* Those graduates complying with alterna-

tive (a) are, as expressly provided in the statute, equal in every regard to those complying with alternative (b). To require applicants who comply with (b) to have experience and pass an examination and not require those applying under (a) to do so would be to discriminate against them and constitute a violation of their rights to equal treatment as guaranteed by the Fourteenth Amendment.

Conclusion

For the foregoing reasons the petition for writ of certiorari to the Supreme Court of the State of New York should be denied.

Respectfully submitted,

CHARLES A. BRIND
Attorney for Respondents
Office and P. O. Address
State Education Building
Albany, New York

Of Counsel
JOHN P. JEHU
ELIZABETH M. EASTMAN
GEORGE B. FARRINGTON
EDMOND RICE

Appendix "A"

SUPREME COURT—ALBANY COUNTY

In the Matter
of
The Application of HYMAN WOLFSON,
Petitioner,
for an Order under Article 78 of the Civil Practice Act,
against
THE STATE EDUCATION DEPARTMENT DIVISION OF PROFESSIONAL EDUCATION UNIVERSITY OF THE STATE OF NEW YORK,
Respondent.

(Albany Special Term, October 23, 1959.)

Appearances:
Hyman Wolfson, Petitioner in Person,
Charles A. Brind, Esq., (John P. Jehu, Elizabeth M. Eastman and George B. Farrington of counsel) Attorney for Respondent.

MEMORANDUM

ELSWORTH, J.

In this article 78 proceeding petitioner seeks to compel the Commissioner of Education to license him as a Certified Public Accountant. He claims that he satisfies the educational requirements of subdivision (a) of section 7403 (2) of the Education Law and therefore is not required to take an examination. It is his contention that such an inter-

pretation is the only grammatical and reasonable construction of said section as enacted as part of Chapter 718 of the Laws of 1959.

A rigid grammatical construction of the section may justify petitioner's conclusion. However, the law has long since discarded precise formalism and no court should dignify the absence of a comma as a talisman without probing behind literal wording. Since 1896, with one exception, the passing of an examination has been a prerequisite to the licensing of a Certified Public Accountant. In enacting section 7403 (2) of the Educational Law, the legislature had no intent to set aside a basic requirement so long existing. Chapter 718 of the Laws of 1959 was intended to bring under regulation the entire field of public accounting. In redrafting the sections relating to Certified Public Accountants, there is not the slightest indication that the legislature and executive branches contemplated a softening of the requirements for applicants seeking certification under that classification.

The petition is dismissed accordingly.

Submit order.

November 25, 1959.

Appendix "B"

McKinney's Statutes

§ 143 Unreasonableness

It is a general rule in the interpretation of statutes that they shall receive a reasonable construction. A forced, unnatural, or ridiculous construction, which might tend to bring contempt upon the administration of justice is to be shunned. An interpretation which is contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent, and some other construction should be placed on the statute, if possible without violation of its language. Whenever the language of an enactment admits of two constructions, the more reasonable of the two should be adopted as that which the Legislature intended. For example, it is unreasonable to suppose that the Legislature would commit to a fire commissioner the discretionary power of requiring slight precautions to be adopted for the avoidance of fires, and deny him the power of requiring effective precautions: and hence a construction of a statute along such lines is avoided. But, if the statute is plain and unambiguous, the courts cannot revise it so as to harmonize it with their conception of reason. It is within the power of the lawmakers to enact an unreasonable law, and if they have done so in clear language, their patent intent must be effectuated by the courts.

Appendix "C"

McKinney's statutes

§ 153 Change in long established rule

An intention of making an innovation in a long established rule of law is not imputed to the Legislature in the absence of a clear manifestation of such intention. Especially is this so, when the change opens the path for hardship, injustice, absurdity, inequality, or other objectionable consequences. This principle is analogous to the doctrine that statutes in derogation of the common law are to be strictly construed. When fundamental principles are overthrown and where the general system of the laws is departed from, the legislative intention must be clearly expressed. Even a practical construction which a statute has received will not be abrogated by the courts where the effect of a change in a rule would cause great mischief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 251

MAURICE F. O'CONNELL, *et al.*,

Petitioners,

against

JAMES E. ALLEN, Commissioner of Education of the State of New York, THE STATE EDUCATION DEPARTMENT, DIVISION OF PROFESSIONAL EDUCATION, UNVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF *AMICUS CURIAE* FILED ON BEHALF OF THE NEW YORK STATE SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS.

MATHIAS F. CORREA,
Attorney for Amicus Curiae,
80 Pine Street,
New York 5, N. Y.

CAHILL, GORDON, REINDEL & OHL,
IRWIN SCHNEIDERMAN,
Of Counsel.

August 22, 1961.

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Respondents.

BRIEF *AMICUS CURIAE* FILED ON BEHALF OF THE NEW YORK STATE SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS.

Introduction.

This case involves the construction of the New York statute involving certification of individuals as Certified Public Accountants. The courts of the State of New York have held that the statute requires passage of an examination and professional experience. Petitioners contend that this construction is unconstitutional and that on the basis of graduation from college alone they are entitled to certificates as Certified Public Accountants.

This brief is filed on behalf of the New York State Society of Certified Public Accountants (the "Society") as *amicus curiae* with the consent of counsel for both petitioners and respondents herein.

The Society is a membership corporation incorporated under the laws of the State of New York on January 25, 1897. Its membership includes accountants who have received certificates as Certified Public Accountants in New York or who have passed the examination prescribed by the University of the State of New York. Its membership as of the beginning of this year exceeded 11,000 persons.

New York has regulated use of the title "Certified Public Accountant" and the initials "C. P. A." since 1896. With one exception (which lasted for one year), passage of an examination testing applicants' proficiency in accounting matters has been a prerequisite to the gaining of a certificate of Certified Public Accountant for this period exceeding sixty years.

The facts as to the responsible part which certified public accountants play in the business life of New York, as indeed of all states, are basically familiar to all. Complete breakdown of the present system of close regulation of this respected profession would inevitably follow if petitioners' assertions prevail, *i.e.*, that neither the experience nor examination requirements as set forth in Section 7403 of the Education Law[1] of the State of New York need be met in their cases as prerequisites to the issuance to them of certificates as Certified Public Accountants.

The Society thus has a peculiar and legitimate interest in apprising this Court of the lack of substance to be found in petitioners' contentions herein.

---

[1] New York State Education Law, §7403, subd. 2, L. 1959, c. 718 §1.

POINT I.

The interpretation of the statute herein involved is a matter for the highest court of New York and as construed by that court is clearly constitutional.

For the purpose of deciding constitutional questions this Court has held that it must take the statute involved "as though it read precisely as the highest court of the State has interpreted it." *Minnesota* v. *Probate Court*, 309 U. S. 270, 273. In the present proceeding, respondents' construction of the New York State Education Law has been upheld separately by two justices of the Supreme Court of that state, by the unanimous affirmation of five justices of the Appellate Division of the Supreme Court of the State of New York for the Third Department, and by affirmation of the Court of Appeals of the State of New York in denying petitioners' leave to appeal to that Court.

The construction of the New York State statute here involved is peculiarly a matter for the courts of that state and there is no basis or reason for issuing a writ of certiorari.

Different states have "from time immemorial" exacted in many pursuits certain degrees of skill and learning upon which the community may confidently rely, and have generally ascertained possession by applicants of such skills and learning by means of examinations. *Dent* v. *West Virginia*, 129 U. S. 114, 122.

The requirement for passage of an examination is clearly constitutional.

The New York State Courts' construction of the New York Education Law as requiring passage of an examination is eminently reasonable and is, in fact, the only permissible construction of the statute.

POINT II.

The construction by the courts of New York of Education Law Section 7403 was the only reasonable construction of this statute.

Petitioners in their petition to this Court fail to note that the laws of New York State have since 1896 required that an applicant for a certificate as Certified Public Accountant pass an examination which tests his knowledge and proficiency in accounting matters. The only exception has been a period of one year shortly after World War II in which persons over 40 years of age with at least 15 years' experience satisfactory to the State Board of Examiners could gain a certificate without examination. L. 1947, c. 340, repealed L. 1948, c. 629, §1.

Comparison of the 1959 amendment to the Education Law (Appendix A) under which petitioners applied for their certificates as Certified Public Accountants with its immediate statutory forerunner (Appendix B) reveals that no change was effected in the nature of the requirements governing formal education, passage of an examination, or the general requirements of professional experience. Even the language employed regarding these various requirements remained the same. The 1959 amendment merely rearranged the listing of these requirements into the chronological order in which applicants would logically meet them.

Petitioners contend that the New York State Legislature in adopting the 1959 amendment intended to delete the requirements for passage of an examination and professional experience. Nothing in the history of the statute will support any such intention to change completely the

requirements of then existing law. *Matter of Delmar Box Co.*, 309 N. Y. 60, 127 N. E. 2d 808 (1955).

Thus, Petitioners in their petition ignored the fact that Article 149 of the New York State Education Law, entitled "Public Accountancy" was extensively revamped in 1959. The clear governing purpose of the 1959 amendments to this article, including the section placed in issue by petitioners, was to bring non-certified public accountants under the system of regulation and ethical discipline theretofore exercised by the New York State Education Department over certified public accountants alone. Rather than relaxing regulation of certified public accountants the amendment *increased control* over the entire field comprising the practice of accounting by introducing a system of regulatory control and ethical discipline over non-certified public accountants as well.

POINT III.

Petitioners have in any event failed to raise a constitutional issue in a timely manner.

Petitioners, obviously recognizing the infirmity of their belated claim of deprivation of property rights under the Fourteenth Amendment of the United States Constitution, assert in their petition (p. 5) that a Federal question was raised "by the very nature" of the proceeding brought to compel issuance of certificates to them. This claim has no merit. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655. This Court has established the rule that a Federal question must be raised in the lowest state court where litigation commences if state procedure so requires. *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 153-54; *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States*, §66, p. 118 (1951).

Petitioners also assert in their petition (p. 5) that they expressly raised a Federal question in their brief seeking leave to appeal to the New York Court of Appeals. An examination of this brief (p. 36) indicates only that a belated claim was made that "Under the provisions of the Fifth Amendment of the Constitution of the United States, the rights asserted by them were statutory property rights . . . .". No question was raised of deprivation of rights under the Fourteenth Amendment of the United States Constitution. Under the same circumstances this Court has refused to accept a question raised under the Fourteenth Amendment when a petitioner in applying to the highest state court had referred only to the Fifth Amendment. *Chapin* v. *Fye*, 179 U. S. 127.

Conclusion.

Petitioners' position is specious and far-fetched insofar as they assert an arbitrary construction of a state statute by the courts of New York. The constitutional question here sought to be raised was in any event not raised in a timely manner.

Respectfully submitted,

Mathias F. Correa,
Attorney for *Amicus Curiae*.

Of Counsel:
Cahill, Gordon, Reindel & Ohl,
Irwin Schneiderman.

APPENDIX A.

L. 1959, c. 718 §1.

"1. An individual shall not be eligible to apply for a certificate or an endorsement of a certificate as certified public accountant unless he is twenty-one years of age or over and of good moral character, is a citizen of the United States or has declared his intention to become a citizen thereof, and, except for an individual applying for indorsement of certificate as certified public accountant, resides or has a place for the regular transaction of business within the state. The date on which the applicant for a certificate passed the last part of the examination required by subdivision two of this section shall be the date on which his legal residence shall be determined for the purpose of eligibility for such certificate.

"2. An individual shall not be eligible to apply for a certificate as certified public accountant unless he has satisfactorily completed a four year high school course approved by the department for this purpose or the equivalent as determined by the commissioner, and either (a) has been graduated from a college, offering a curriculum in accounting which shall have been registered by the department, or (b) has been graduated from college and has had equivalent college training in accountancy as determined by the commissioner and has the professional experience required by the regulations of the commissioner and passes the examination required by the department or has passed, before the enactment of this article, all parts of the examination required by the department but has not received a certificate as a certified public accountant because of the lack of the professional experience required by the regulations of the commissioner. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the

board of examiners or corresponding agency in another state.

"3. The department, upon the filing with it of an application, accompanied by the prescribed fee, shall issue a certificate as a certified public accountant of the state to any individual who submits evidence satisfactory to the department that he complies with the requirements of subdivisions one and two of this section.

"4. The department, upon the filing with it of an application, accompanied by the prescribed fee, and upon the recommendation of the board, may, in its discretion, without examination and without requirements as to residence or place of business, but otherwise subject to the academic and professional experience requirements set forth in subdivision two of this section, and the rules of the commissioner promulgated thereunder, indorse a certificate of a certified public accountant issued by another state or any political subdivision of the United States, provided that the applicant is in good and regular standing as a certified public accountant in each state or political subdivision of the United States from which he has ever received a certificate of certified public accountant. Except as otherwise provided in this article, such indorsement shall be deemed to be a certificate of certified public accountant of the state and an individual to whom such an indorsement shall have been made shall be deemed to be a certified public accountant of the state.

"5. A certificate of certified public accountant of the state issued at any time prior to the date when the present provisions of subdivisions one and two of this section shall have become effective shall be deemed to be a certificate of certified public accountant of the state and an indorsement of a certificate of certified public accountant of any other state or any political subdivision of the United States made prior to the date when the present provisions of the subdivision four of this section shall have become effective shall be deemed to be an indorsement pursuant to this article of a

certificate of certified public accountant of any other state or political subdivision of the United States; and any individual to whom such a certificate of certified public accountant of the state shall have been issued or for whom such an indorsement shall have been made shall while such certificate or indorsement shall be unrevoked and unsuspended be a certified public accountant of the state.

• • • • • •

"7. The certificate or the indorsement of the certificate as a certified public accountant issued pursuant to this section of an individual not a citizen of the United States shall become void at the expiration of eight years from the date of his declaration of intention to become a citizen, unless prior to the expiration of the said eight years evidence is furnished to the department that the said individual has become a citizen of the United States."

APPENDIX B.

L. 1956, c. 545

"1. The certificate of certified public accountant of the state shall be issued, upon application to the department and the payment of a fee to be fixed by the department, which fee is to accompany the application, to any citizen of the United States, or to any person who has declared his intention of becoming such citizen, who resides within the state or has a place for the regular transaction of business therein, who is twenty-one years of age or over and of good moral character, who submits evidence satisfactory to the department of the possession of academic and professional qualifications for the public practice of accountancy and who passes the examination required by the department; provided, that the certificate of certified public accountant of the state issued to any person who has declared his intention of becoming a citizen of the United States shall become void at the expiration of eight years from the date of the declaration of the intention of such applicant to become a citizen, unless prior to the expiration of said eight years evidence is furnished to the department that the applicant has become a citizen of the United States. Provided, further, that every candidate for examination for a certificate of certified public accountant of the state shall present evidence that he has graduated from a college offering a curriculum in accounting which shall have been registered by the department, or that he has graduated from college and has had equivalent college training in accountancy as determined by the commissioner of education, and that prior to the beginning of his course of study in such college he satisfactorily completed a four year high school course approved for this purpose or the equivalent as determined by the commissioner of education. The department on the recommendation of the board may also accept in lieu of the passing of the whole or any part of the examination referred to herein, satisfactory proof of the passing of an examination of similar grade and content, or part thereof, given by the board of examiners or corresponding agency in another state."